NGV TECH SDN BHD & ANOR v. KERAJAAN MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI J
[ORIGINATING SUMMONS NO: 24NCC-83-02-2015]
5 APRIL 2016

SALE OF GOODS: *Construction of contract – Ownership of vessels – Passing of title to vessels – Intention of parties – Defendant claimed ownership due to payments made towards construction of vessels – Whether title to vessels passed only upon full delivery or during construction – Whether title to vessel passed with every progress payment made – Whether defendant rightful owner of vessels – Sale of Goods Act 1957, ss. 2, 19(2)*

CONTRACT: *Construction of contract – Ownership of vessels – Passing of title to vessels – Intention of parties – Defendant claimed ownership due to payments made towards construction of vessels – Whether title to vessels passed only upon full delivery or during construction – Whether title to vessel passed with every progress payment made – Whether defendant rightful owner of vessels – Sale of Goods Act 1957, ss. 2, 19(2)*

In the originating summons, the plaintiffs sought the following declaratory orders (i) that the first plaintiff was the rightful owner of two vessels known as 'Gagah Samudera' and 'Teguh Samudera' ('the vessels') as defined in the Shipbuilding Contract between the first plaintiff and the defendant ('the agreement'); (ii) that the vessels were, at all material times, charged to the second plaintiff by the first plaintiff, and (iii) that the second plaintiff as chargee of the vessels and/or Mr Duar Tuan Kiat as the receiver and manager of the first plaintiff, were entitled to deal with and/or dispose the vessels. Briefly, the facts were that the first plaintiff and the Government of Malaysia executed the agreement to supply two units of training vessels for the Royal Malaysian Navy. The contract sum was agreed at RM294 million. Pursuant to a letter of assignment, payment for the progress of works was to be made to Malayan Banking Berhad. The vessel 'Gagah Samudera' was kept at the TLDM base whilst 'Teguh Samudera' was kept at the first plaintiff's dockyard. Before the vessels could be completed, a receiver and manager ('R & M') was appointed over the first plaintiff. Subsequent to this event, the first plaintiff was wound up. The defendant then exercised its rights to terminate the agreement. As at the termination date, a sum of RM249.9 million had been paid towards the construction of the vessels. The first plaintiff was also liable to pay liquidated and ascertained damages of RM46.06 million resulting from the delay in the delivery of the vessels. Dispute between the defendant and the plaintiffs arose when the defendant requested to transfer the vessel 'Teguh Samudera' and equipments therein from the shipyard of the first plaintiff to Pusat Hidrogafi Nasional and Pangkalan TLDM. The second plaintiff contended that the first plaintiff was the owner of the vessels. The defendant, on the other hand, claimed

ownership having made payments towards the construction of the vessels. Therefore, in order to ascertain the rightful ownership to the vessels, the issue in this case was on the construction of the agreement.

Held (dismissing application):

(1) The subject matter of the contract was the purchase of the vessels by the defendant, which was to be built by the first plaintiff. As the agreement was for the purchase of the vessels, under s. 2 of the Sale of Goods Act 1957, ('SOGA'), vessel falls within the meaning of 'goods', that is 'every kind of movable property'. The agreement was thus subject to SOGA. As there was no specific clause in the agreement on the passing of the title in the property from the first plaintiff to the defendant, it was therefore the duty of this court to ascertain the intention of the parties, and in so doing this courts would have to be guided by the principles laid down in s. 19(2) which provides that for ascertaining the intention of the parties, regard shall be had to the terms of the contract the conduct of the parties and the circumstances of the case. (paras 16 & 20)

(2) Under cl. 7.1 of the agreement, an advance payment of RM29.4 million was paid to the first plaintiff even before the first stage of construction. As the construction progressed, further payments were made, leaving only the last 5% of the contract sum to be paid when the vessels were delivered to the defendant. This substantiated the intention of the parties that title was to pass during construction. Further, in the absence of a refund guarantee taken out by the first plaintiff, it must be implied that the title to the vessel was passed with every progress payment made by the defendant. The advance payment of 10%, the scheduled payments upon completion at each stage of the construction, the close supervision over the construction by the project team coupled with the launching ceremonies and the naming of the vessels clearly showed that under the agreement, the parties intended that the titles to the vessels were to be passed to the defendant during the construction of the vessels. (paras 26, 27 & 33)

(3) The contract sum involved was substantial. The agreement was one which called for huge financial commitment of the defendant to honour the scheduled progress payments which were made towards the construction of the vessels. The defendant had, until the date of termination, made a total payment of RM249.9 million of tax payers monies, towards the purchase of the vessels. As such, it could not have been the intention of the parties in such circumstances for the property to pass only upon full delivery of the vessels. It would not make commercial sense for the defendant to be exposed to the risk of great financial loss in the event of the first plaintiff being wound up if the title was to pass only upon delivery. The defendant who had paid a substantial sum towards the construction stood to lose all that had been

paid to date. From the nature of the agreement which was akin to a construction contract from its terms, coupled with the background facts must lead to the conclusion that the defendant was the owner of the vessels. (paras 39, 40 & 43)

(4) In any event, the defendant had paid an amount of RM249.9 million towards the construction of the vessels, leaving an amount of RM44.1 million yet to be paid. The liquidated and ascertained damages ('LAD') for late delivery amounted to RM46.06 million and under cl. 20, the defendant was entitled to set off the amount of LAD against the purchase price of RM294 million as a deduction of money due to be paid by the first plaintiff from money due to be paid by the defendant. Therefore, even if ownership passed only upon full payment of the purchase price, the purchase price would have been fully settled taking into account the amount of LAD. (para 42)

(5) The plaintiffs sought for a declaration. It is common ground that declarations are issued at the discretion of the court. In the present case, there were no legal grounds to justify the granting of the prayer for declaration. (paras 47 & 48)

Case(s) referred to:
Aqua Logistics Pte Ltd v. Sasacom Sdn Bhd [2008] 8 CLJ 405 HC ***(refd)***
Au Yong Kun Min v. Tractors (M) Bhd [1997] 5 CLJ 31 HC ***(refd)***
Borneo Helicopters Sdn Bhd & Ors v. Sabahair Aviation Sdn Bhd [2014] 1 LNS 1897 CA ***(refd)***
Mohamed Noor Othman & Ors v. Hj Mohamed Ismail Hj Ibrahim & Ors [1988] 3 MLJ 82 ***(refd)***
Re Blyth Shipbuilding & Dry Docks [1926] Ch 494 ***(refd)***
Seath & Co v. Moore [1886] 11 AC 350 ***(refd)***
Wood v. Bell (1856) 6 E & B 355 ***(refd)***

Legislation referred to:
Sale of Goods Act 1957, ss. 2, 19(1), (2)
Specific Relief Act 1950, s. 41

For the plaintiff - SM Yoong, KK Chan & SS Tan; M/s Shook Lin & Bok
For the defendant - Alice Loke Yee Ching; SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Azizah Nawawi J:

Introduction

[1] In the originating summons, the plaintiffs are seeking the following declaratory orders:

(i) that the first plaintiff is the rightful owner of two vessels known as 'Gagah Samudera' and 'Teguh Samudera' ("the vessels"), including the hulls, machinery, auxiliaries, weapons, systems and equipment as defined in the shipbuilding contract dated 21 February 2012 between the first plaintiff and the defendant ("the agreement");

(ii) that the vessels are, at all material times, charged to the second plaintiff by the first plaintiff; and

(iii) that the second plaintiff as the chargee of the vessels and/or Mr Duar Tuan Kiat as the receiver and manager of the first plaintiff, are entitled to deal with and/or dispose of the vessels.

[2] The grounds of this application are, *inter alia*, as follows:

(a) by the terms of the agreement, the first plaintiff was to construct the vessels and thereafter sell the same to the defendant. The plaintiffs contend that at all material time, the vessels belonged to the first plaintiff;

(b) The second plaintiff had granted various credit facilities to the first plaintiff. To secure the said facilities, the debentures dated 24 January 2008, and 11 June 2010 and four further debentures, all dated 26 June 2012 ("the debentures") were executed by the first plaintiff in favour of the second plaintiff. The debentures created both fixed and floating charges over all of the assets of the first plaintiff including the vessels;

(c) A receiver and manager over the first plaintiff have been appointed on 3 April 2013, and the first plaintiff was wound up by the court on 14 May 2013.

(d) The defendant had terminated the agreement on 27 January 2014 and alleged that it is the owner of the vessels; and

(e) The plaintiffs contend that pursuant to the terms of the shipbuilding agreement and the debentures, the defendant's rights, if any, are not as owner of the vessels but, if at all, the defendant is only entitled to damages, which stands as an unsecured debt due from the first plaintiff.

The Salient Facts

[3] The salient facts, as submitted by learned Senior Federal Counsel, Puan Alice Loke in her written submission, are not in dispute. On 21 February 2012, the first plaintiff and the Government of Malaysia executed the agreement to supply two units of training vessels for the Royal Malaysian Navy. The contract sum was agreed at RM294 million. The completion dates were agreed to be on 15 May 2013 and 30 June 2013 respectively.

[4] Payment for the vessels was as stipulated in Schedule No. 3 of the agreement, which was subsequently amended by way of a supplementary agreement dated 9 November 2012. Payment by the defendant was based on the completion of the stages mentioned therein.

[5] Pursuant to a letter of assignment dated 2 June 2011 which was consented to by the defendant on 6 June 2011, payment for the progress of works was to be made to Malayan Banking Berhad.

[6] On 14 December 2012 and 27 February 2013, a launching ceremony was held where both vessels were named "Gagah Samudera" and "Teguh Samudera" respectively. For the purposes of the launching ceremony, the program books were exhibited as "ZJ - 4". In the program book for the launching ceremony on 14 December 2012, the Executive Chairman of the first plaintiff said as follows in his "Kata Alu-Aluan":

> Pembinaan Kapal Latihan ini dianggap amat istimewa buat kami kerana Kapal Latihan ini merupakan kapal milik TLDM yang pertama dibina oleh syarikat kami ...

[7] After the said launching, the vessel "Gagah Samudera" was kept at the TLDM base, Lumut, whilst "Teguh Samudera" was kept at the first plaintiff dockyard.

[8] Before the vessels could be completed, a receiver and manager ("R & M") was appointed by Malayan Banking Berhad on 3 April 2013 over the first plaintiff. Subsequent to this event, the first plaintiff was wound up pursuant to a winding order made by the Kuala Lumpur High Court on 14 May 2013.

[9] As the first plaintiff had been wound up, the defendant exercised its rights under cl. 22 to terminate the agreement on 27 January 2014. As at the termination date, a sum of RM249.9 million had been paid towards the construction of the vessels. As at 21 January 2014, the first plaintiff was also liable to pay liquidated and ascertained damages of RM46.06 million resulting from the delay in the delivery of the vessels. This sum was calculated from the respective completion dates of the vessels until the termination of the agreement.

[10] The dispute between the defendant and the plaintiffs arose when on 12 June 2014, the defendant requested to transfer the vessel 'Teguh Samudera' and equipment therein from the shipyard of the first plaintiff in Sijangkang to Pusat Hidrografi Nasional and Pangkalan TLDM, Lumut. The defendant was compelled to make the request to prevent further deterioration of the vessel and to ensure the safety of the equipment on board.

[11] The second plaintiff contends that the first plaintiff is the owner of the vessels. The defendant on the other hand, claims ownership having made payments towards the construction of the vessels.

A **The Findings Of The Court**

[12] The plaintiffs' application for declaration is made under s. 41 of the Specific Relief Act 1950 ('the SRA 1950') which reads:

> 41. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled ...

[13] It is the plaintiffs' case that under the agreement, the first plaintiff is the owner of the vessels at all material times. The plaintiffs submit that under the agreement, the first plaintiff is to construct the vessels and thereafter to sell the vessels to the defendant. This, according to the plaintiff, is based on para. 2 of the recital, cls. 3.1, 17.2.21 and 8.16.6 of the agreement.

[14] However, it is the submission of the defendant that upon a true construction of the agreement, the defendant is the rightful owner of the vessels up to the extent of which the vessels are built or that the defendant has made progressive payments to the first plaintiff.

[15] Therefore, the issue in this case is on the construction of the agreement, in order to ascertain the rightful ownership to the vessels. As this case involves the construction of a commercial contract, reference is made to the decision of the Court of Appeal in *Borneo Helicopters Sdn Bhd & Ors v. Sabahair Aviation Sdn Bhd* [2014] 1 LNS 1897, where Justice Azahar Mohamed said as follows:

> [32] The Management Agreement is a commercial contract. **It therefore must be construed in a commercially sensible manner, that is to say, in a manner in which a reasonable commercial person would construe them (see *Mannai Investment v. Eagle Star* [1997] 3 All ER 352**). The construction of a contract is a question of law to be determined by the court and the court is not bound by the admission of witnesses or the concession made by counsel (see *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96). *To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties.* To ascertain the parties' intention, the court does not of course inquire into the parties' subjective states of mind but make an objective judgment based on the materials already identified (see *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1988] 1 WLR 896) (emphasis added)

[16] From the recital of the agreement, the subject matter of the contract is the purchase of the vessels by the defendant, which was to be built by the first plaintiff. As the agreement is for the purchase of the vessels, under s. 2 of the Sale of Goods Act 1957 ('SOGA 1957'), vessel falls within the meaning of "goods', that is "every kind of movable property". The agreement is then subject to SOGA 1957. This is in line with the case of

Re Blyth Shipbuilding & Dry Docks [1926] Ch 494 where it was held that a shipbuilding contract to be "unquestionably a contract for the sale of future goods within the meaning of the Sale of Goods Act 1893."

[17] Section 19 of SOGA 1957 provides that property in the goods passes to the buyer when the contracting parties intend the property to pass. Section 19(1) states as follows:

> 19. (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred ...

[18] The application of s. 19 of the SOGA 1957 was considered in the case of *Aqua Logistics Pte Ltd v. Sasacom Sdn Bhd* [2008] 8 CLJ 405, where the court held as follows:

> It must be emphasised that s. 19 of SGA 1957 to a large extent gives effect to the *elementary principle of the law of contract that the parties may fix the time when the property in the goods shall be treated to have passed. It may be the time of delivery, or the time of payment of price or even the time of making the contract. It all depends on the intention of the parties. It is therefore, the duty of the court to ascertain the intention of the parties and in so doing the courts have to be guided by the principles laid down in s. 19(2) which provides that for ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case* ... (emphasis added)

[19] In *Au Yong Kun Min v. Tractors (M) Bhd* [1997] 5 CLJ 31, Justice Augustine Paul held that:

> It is open to the parties to fix the time when the property in the goods is to pass to the buyer. When there is no specific provision in the contract about the passing of the property from the seller to the buyer an inference has to be drawn from the conduct of the parties (see *Hindustan Malleables Forgings Ltd v. Indian Furnace Co Ltd* AIR [1979] Pat 146; *Baij Nath v. Nand Ram* AIR [1926] Pat 353). In *Kamala Sugar Mills Ltd., Delhi v. Gang Bison Bahaman Singh* AIR [1978] Mad 178 cl. 1 of the contract between the plaintiff and the defendants provided that a railway receipt was deliverable against cash or documents negotiated through a bank, though the other terms had provided that the goods would be dispatched at the buyer's risk and that the defendants were not responsible for any loss or damage after the goods had left their promises, it was held that the goods had passed even prior to the railway receipt having been honored by payment either in cash or through the agency of the bank. The very fact that the defendants had made it clear in their letter that all the goods had been appropriated and were ready for dispatch and which fact the plaintiff took for granted had raised the usual presumption that the defendants had appropriated the goods unconditionally to the contract and that they were in a deliverable state and the only thing that remained in order to perform the contract was to put them in a wagon for their onward transport.

[20] As there is no specific clause in the agreement on the passing of the title in the property from the first plaintiff to the defendant, it is therefore the duty of this court to ascertain the intention of the parties, and in so doing

this courts will have to be guided by the principles laid down in s. 19(2) which provides that for ascertaining the intention of the parties, regard shall be had to:

(i) the terms of the contract;

(ii) the conduct of the parties; and

(iii) the circumstances of the case.

Added to that, bearing in mind that this is a commercial contract, it must be construed in a commercially sensible manner.

[21] It is the plaintiffs' contention that the intention of the parties is for the title in the vessels to be passed to the defendant only when:

(i) full payment of purchase price is made by the defendant; and

(ii) the certificate of final acceptance is duly signed and given to the defendant to signify the delivery and acceptance of the vessels to the defendant under cl. 8.16.6.

[22] Therefore, since the defendant has failed to make the full payment and in the absence of the certificate of final acceptance, the plaintiffs submit that the first plaintiff is the owner of the vessels.

[23] However, having considered the terms of the agreement, the conduct of the parties and the circumstances of the case, I am of the considered opinion that it is the intention of the parties that the titles to the vessels have passed to the defendant during the construction stages of the vessels, and not as submitted by the plaintiffs after full payment and the issuance of the certificate of final acceptance. My reasons are as follows.

Terms Of The Agreement

[24] From the terms of the agreement, cl. 7 provides for a schedule of progress payment, as *per* sch. 3 to the agreement. This schedule was subsequently amended by a supplementary agreement dated 9 November 2012 (see exh. "ZJ-1"). From this appendix A to the supplementary agreement, parties had provided for payment to be made as *per* the progress of work/construction as stipulated therein.

[25] Bearing in mind the hybrid nature of shipbuilding contract, which bears a close resemblance to a building contract, I am of the considered opinion that the parties had intended for the property in the vessels to pass to the Government as and when payment is made in respect of the various stages in the construction of the vessels. On this I refer to "*The Law of Shipbuilding Contracts* by Simon Curtis" (4th edn), where it was opined that:

> The overwhelming majority of international shipbuilding contracts confer title to the vessel upon the builder throughout the construction period on the basis that the buyer's pre-delivery credit risk will be secured by a refund guarantee; this will typically be provided to the buyer as a

> condition of payment of the first instalment of the contract price. Title to the vessel will be transferred to the buyer concurrently with the execution of the Protocol of Delivery and Acceptance, whether or not the balance of the contract price is payable in full at that time.
>
> If however, the builder is not in a position to provide a satisfactory refund guarantee, it may be agreed that the vessel itself should stand as security for the buyer's pre-delivery instalments. In such circumstances the contract will provide that title to the vessel, together with all equipment and materials intended for her, should pass to the buyer during the course of her construction.

[26] In the present case, there was no such refund guarantee taken out by the first plaintiff. In the absence of such guarantee, I agree with SFC Puan Alice that it must be implied that the title to the vessel is passed with every progress payment made by the defendant.

[27] Further, under cl. 7.1 of the agreement, an advance payment of RM29.4 million was paid to the first plaintiff even before the first stage of construction. As the construction progresses, further payments are made, leaving only the last 5% of the contract sum to be paid when the vessels were delivered to the defendant. This also substantiates the intention of the parties that title is to pass during construction.

[28] Clause 3.4 provides that the vessels shall be commissioned as the Royal Malaysian Navy Training Vessels, with the capability specified in Schedule No. 4. The vessels were built for a specific purpose and not a general commercial purpose.

[29] Under cl. 13 of the agreement, the defendant shall establish a project team for close monitoring of the implementation of the contract, from the effective date until the delivery of the second vessel. The vessels were to be built in strict compliance with the contractual building specification approved by the defendant.

[30] Clause 22.2 which permits the defendant Government to place a consolidated order of the vessels and the first plaintiff is also to advise the defendant on the equivalent source of supply in the event of winding up. Implicit in this clause is that the Government has a right to the vessels and is allowed to continue with the construction of the vessels.

[31] Clause 8.5 provides for an acceptance committee which is to comprise of the defendant's representatives, for the purpose of the final acceptance test. There is close involvement of the defendant in the entire construction.

[32] Clause 14.2 mandates that the first plaintiff is to provide the Government with a report on the implementation progress of the agreement every month. There is therefore a close supervision of the construction of the naval training ships to ensure that it meets with the requirements of the Government.

[33] Therefore, from the above terms of the agreement, I find that it is the intention of the parties that the titles to the vessels are to pass to the defendant during the construction of the vessels. The advance payment of 10%, the scheduled payments upon completion at each stage of the construction, the close supervision over the construction by the project team coupled with the launching ceremonies and the naming of the vessels clearly shows that under the agreement, the parties have intended that the titles to the vessels are to be passed to the defendant during the construction of the vessels.

[34] This position is supported by several cases, which are as follows:

(i) In *Seath & Co v. Moore* [1886] 11 AC 350, the issue for determination was whether the machinery to be fitted to a ship were considered to have become the property of the builders upon the bankruptcy of the manufacturers of the machinery, in the course of which the House of Lords made the following comments:

> The English cases to which I have referred appear to establish the principle that where it appears to be the intention, or in other words the agreement, of the parties to a contract for building a ship, that at a particular stage of its construction, the vessel so far as then finished, shall be appropriated to the contract of sale, the property of the vessel as soon as it reached the stage of completion will pass to the purchaser.

(ii) In *Re Blyth Shipbuilding & Dry Docks* [1926] Ch 494 a shipbuilding contract provided for payment of the purchase price of the vessel by instalments. After the first two instalments of the purchase money had been paid and the vessel partly constructed, a receiver was appointed in an action commenced by debenture holders of the shipbuilding company. It was held that although the ship had not been completed, the property in the uncompleted ship had passed to the purchasers.

(iii) In *Wood v. Bell* (1856) 6 E & B 355, the plaintiff entered into an agreement with J to build an iron steamship where the price was to be paid by instalments. The construction of the ship was supervised by H, appointed by the plaintiff. When J became a bankrupt when the ship was still unfinished, the court held that the title to the ship passed before completion taking into account the plaintiff's payment by instalment, his supervision of the vessel's construction and the punching of the name "Britannia" on her keel. The fact of regular inspection is accepted as relevant and indicative of the intention of the parties.

Conduct Of The Parties

[35] With regards to the conduct of parties, I am of the considered opinion that from the program books, (ZJ - 4) issued for the purpose of the launching ceremony on 14 December 2012, the Executive Chairman of the first plaintiff said as follows in his "Kata Alu-Aluan":

> Pembinaan Kapal Latihan ini dianggap amat istimewa buat kami kerana Kapal Latihan ini merupakan kapal milik TLDM yang pertama dibina oleh syarikat kami ...

[36] This statement was echoed by the Minister of Defence himself in his "Kata Alu-Aluan" where he said this:

> ... Gembira dan berbangga kerana Kapal Latihan TLDM ini merupakan kapal TLDM pertama dibina oleh NGV Tech Sdn Bhd dengan kerjasama Syarikat Daewoo Shipbuilding Marine Engineering (DSME) dari Korea Selatan.

[37] Added to that, the launching ceremonies were held on 12 December 2012 and 27 February 2013, where the vessels were named "Gagah Samudera" and "Teguh Samudera" respectively. These ceremonies clearly show that the parties had taken the position that the vessels belonged to the defendant (see *Wood v. Bell (supra)*), whilst they are being built by the first plaintiff.

Circumstances Of The Case

[38] It is not in dispute that the contract sum involved here is substantial. The agreement is one which called for huge financial commitment of the defendant to honor the scheduled progress payments which were made towards to construction of the vessels. The defendant had, until the date of termination, made a total payment of RM249.9 million of tax payers monies, towards the purchase of the vessels.

[39] As such, it could not have been the intention of the parties in such circumstances for the property to pass only upon full delivery of the vessels. It would not make commercial sense for the defendant to be exposed to the risk of great financial loss in the event of the first plaintiff being wound up if the title is to pass only upon delivery. The defendant who has paid a substantial sum towards the construction stands to lose all that has been paid to date. If the term as to title is not implied, the defendant would have opted to make a lump sum payment only upon complete construction of the vessel.

[40] Therefore, from the terms of the agreement, the conduct of the parties and the circumstances of the case, I am of the considered opinion that it is the intention of the parties that the property in the vessels is to pass to the defendants upon payments of the scheduled payments in accordance with the stages of construction of the vessels.

[41] With regards to the plaintiffs' contention that the legal title remains with the first plaintiff unless the defendant makes full payment of the purchase price for the vessels, I am of the considered opinion such was contrary to the intention of the parties upon the construction of the agreement as a whole.

[42] In any event, the defendant has paid an amount of RM249.9 million towards the construction of the vessels, leaving an amount of RM44.1 million yet to be paid. The liquidated and ascertained damages ("LAD") for late delivery amounts to RM46.06 million and under cl. 20, the defendant is entitled to set off the amount of LAD against the purchase price of RM294 million as a deduction of money due to be paid by the first plaintiff from money due to be paid by the defendant. Therefore, even if ownership passes only upon full payment of the purchase price, the purchase price would have been fully settled taking into account the amount of LAD.

[43] The plaintiffs further submit that since the defendant has terminated the agreement, then pursuant to s. 22 of the agreement, the defendant's remedy is only in respect to damages. On this, I am of the considered opinion that in the circumstances of this case where the vessels were constructed and built from tax payers monies, where the vessels concerned are naval training ships with its peculiar features, and where the vessels were launched and named before full completion, and coupled with the reasons enumerated above, it is absurd that the defendant/Government, having paid RM249.9 million, is only limited to damages, and whatever paltry sum that is left in the first plaintiff's account. Therefore, I agree with Puan Alice Loke that from the nature of the agreement, which is akin to a construction contract from its terms, coupled with the background facts must lead to the conclusion that the defendant is the owner of the vessels.

[44] The plaintiffs also contended that from cl. 8.16.6 of the agreement, the parties must execute the certificate of final acceptance, after all the required trials on the vessels are carried out the first plaintiff, to finalise the delivery and acceptance of the vessels and signifies the passing of titles from the first plaintiff to the defendant. This, according to the plaintiffs shows that the agreement is for the first plaintiff to construct first, and thereafter to sell the vessels to the defendant.

[45] However, it is not in dispute that the parties already had a launching ceremony, where the vessels have been named, "Gagah Samudera" and "Teguh Samudera". Added to that, one of the vessels has already been in the possession of the defendant since the launching. And the defendant, having grave concern over the other vessel, "Teguh Samudera", to prevent further deterioration of the vessel and to ensure the safety of the equipment, was compelled to make the request for the same.

[46] Premised on the reasons enumerated above, I am of the considered opinion that having considered the terms of the agreement, the conduct of the parties and the circumstances of the case, it is the intention of the parties that the ownership of the vessels rest with the defendant, who have made the payments towards the construction of the vessels. It is not the usual contract where the first plaintiff will construct the vessels first, and thereafter will sell the vessels to the defendant.

Conclusion

[47] In this case, the plaintiffs are seeking a declaration. It is common ground that declarations are issued at the discretion of the court. In *Mohamed Noor Othman & Ors v. Hj Mohamed Ismail Hj Ibrahim & Ors* [1988] 3 MLJ 82, the Supreme Court said at p. 84:

> It is also an established principle consistently followed by our courts that the issuing of a declaration is discretionary. The power to issue a declaration should be exercised with circumspection with a proper sense of responsibility and ought not to be exercised unless the circumstances justify it.

[48] In the present case, I do not find any legal grounds to justify the granting of the prayer for declaration. Premised on my findings above, the application for a declaration is dismissed with cost.